APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD D. ZELECHOWER, M.D. et al.,)
Plaintiffs-Appellants,)
vs.) No.
EVELLE J. YOUNGER, etc., et al.,) 23,331
Defendants-Appellees.)

[February 27, 1970]

Appeal from the United States District Court
for the Central District of California

Before: BARNES, KOELSCH and KILKENNY, Circuit Judges BARNES, Circuit Judge:

Appellants sought damages, declaratory and injunctive relief in the district court alleging the unconstitutionality of several California statutes governing grand jury selection and violation of the Civil Rights Act. (42 U.S.C. §§ 1981, 1983.) Preliminary injunctive relief was denied and the action was dismissed as presenting no substantial federal question. Plaintiffs brought this appeal under 28 U.S.C. § 1391 assigning numerous errors to the disposition below.

Appellants Peter D. and June Bogart were indicted in February, 1964, on charges of grand theft. Appellants Richard D. Zelechower, M.D. and Theodore and Susan Cohen were similarly indicted in September of 1966.[1]

The Bogarts were convicted on some of the charges[2] contained in their indictment on July 25, 1965. The Cohens and Zelechowers were similarly convicted on September 28, 1967. On October 5, 1967, appellants joined in this suit in an effort to restrain further prosecution under some of the counts of the 1964 and 1966 indictments that are still outstanding. They also sought other relief, which is described in greater detail, *post*.

Appellants' pleading requested several forms of relief. *First*, they sought injunctive relief against the giving of further force or effect to the 1964 and 1966 indictments in addition to a mandatory injunction ordering the dismissal of the remaining counts of those indictments (C.T. 11).

Second, they sought a declaratory judgment that Cal. Penal Code § 897, Cal. Code Civ. Proc. § 200 and Superior Court Rule 29, all of which govern the selection of Grand Jurors, "are repugnant to the Constitution of the United States. . . ." (C.T. 12)

Third, they sought nominal damages of one dollar, reserving " . . . the right to amend this item of their

[1]Some of the appellants were also charged with criminal conspiracy but it is not clear from the pleadings and affidavits at whom these charges were directed.

[2]It is not clear from the record which charges resulted in convictions

prayer, in the event they should decide to pray for full compensatory damages." (C.T. 11)

On February 2, 1968, the district court denied appellants' request for preliminary injunctive relief pending final determination of the merits of the case. (C.T. 58-61) On February 5, 1968, appellants' action was dismissed on the following grounds:[3] (1) that the Civil Rights Act does not create an exception to the long-standing rule[4] prohibiting federal injunctions against pending state criminal proceedings; (2) that decisions of the Supreme Court on the issue of jury selection clearly foreclosed the substantiality of appellants' action; (3) that the named defendants were not subject to damage suits under the Civil Rights Act.

Appellants, other than Peter D. and June Bogart, have abandoned their appeal; and so to them the appeal is dismissed.

Peter and June Bogart appear in pro per. As to their claims against defendants Evelle J. Younger, individually and as District Attorney of the County of Los Angeles; the Board of Supervisors of the County of Los Angeles; the Superior Court of the State of California for the County of Los Angeles, et al.; Thomas C. Lynch; "The People of the State of California, by Ronald Reagan, Governor of the State of

[3]Although the trial court dismissed the complaint for failure to state a claim upon which relief could be granted (Rule 12(b)(6) Fed R. Civ. Proc.), its action was in the nature of summary judgment on the merits since matters outside the pleading were considered (C.T. 65) See Rules 12 (d) and 56 (c) Fed. R. Civ. Proc.

California," we hold them improperly joined as defendants, and immune from suit.

As to Peter D. and June Bogart's claims against defendants Evelle J. Younger, individually and as District Attorney of the County of Los Angeles, and Thomas C. Lynch, individually and as Attorney General of the State of California, we will not pass on their claimed immunity, because of the following.

This appeal, now on behalf of Peter D. and June Bogart, presents two legal issues: Was the district court correct in denying preliminary and permanent injunctive relief? Was a substantial federal question presented by appellants' pleading? We hold these issues were correctly resolved against the appellants.

Preliminary Injunctive Relief Against Further Force and Effect of the Outstanding Indictments Was Correctly Denied

Appellants contend that the district court misread the case of *Douglas v. City of Jeannette,* 319 U.S. 157 (1943) (Appt. Br. 42) in denying their motion for a preliminary injunction. We disagree, particularly in view of the recent Supreme Court case of *Bokulich v. Jury Commission;* 394 U.S. 97 (1969). In *Bokulich* a three-judge district court found systematic exclusion of Negroes from the grand and petit juries of Greene County, Alabama. The trial court issued an injunction ordering the immediate compilation of a jury list on

a nondiscriminatory basis, but the panel refused to enjoin the criminal charges pending against the appellants that were about to be handed down by grand juries allegedly unconstitutionally chosen. The Supreme Court affirmed stating:

> "The District Court was warranted in assuming that the constitutional defects of which the appellants complained might be promptly remedied by compliance with its order that juries be reconstituted on a nondiscriminatory basis. If they were not, and if the appellants were in fact indicted, the appellants could raise any objection to the composition of the jury as a defense to their prosecutions. In these circumstances the court could properly conclude that this was not one of 'those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent.' *Douglas v. Jeannette*, [Citation omitted]." 394 U.S. at 98-9.

It is clear from this passage that the Supreme Court has foreclosed the possibility of injunctive relief against criminal prosecutions resulting from indictments handed down from unconstitutionally constituted grand juries. We reject as patently without merit appellants' contention, raised for the first time in their appellate brief (Appt. Br. 43), that this case has any First Amendment implications that would bring it within the rules enunciated in *Dombrowski v. Pfister*, 380 U.S. 479 and *Zwickler v. Koota*, 389 U.S. 241.

Appellants Did Not Present A Substantial Federal Question Requiring the Convocation of A Three-Judge Court

The district court found no substantial federal question presented by appellants' pleadings and affidavits and thus refused to convene a three-judge court under 28 U.S.C. § 2281. It found the exclusion of certain professionals to be based upon a recognized state interest of shielding certain professional occupations from the interference that would result from jury service. As such, the excluded class was not arbitrarily defined. This was found to be in line with the early holding of *Rawlins v. Georgia*, 201 U.S. 638, 640, in which Mr. Justice Holmes stated:

> "[T]he business of the persons omitted [is] such that either they would have been entitled to claim exemption or that probably they would have been excused."

Apellants contend that "Rawlins has been completely abandoned" (App. Op. Br. 18).[5] We can find no authority for this proposition, and *Hoyt v. Florida*, 368 U.S. 57 (1961) suggests the contrary.

In *Hoyt* the Supreme Court upheld a jury selection statute that excluded a much broader class of persons from jury duty than is excluded by the California statutes in issue. Mr. Justice Harlan, in finding the ex-

[5] We also reject appellants' contention that *Rawlins* was decided solely upon the grounds that the objectors to such jury discrimination were not members of the excluded professions." (Appt. Br. 30)

clusion of all women from jury duty was not necessarily unconstitutional, emphasized that the relevant inquiry in determining the constitutionality of jury selection statutes is the *rational nexus* between the population of the excluded class and the state interest to be advanced by the exclusion. Specifically, he said:

> "Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the *exemption itself* is based on some *reasonable classification* and whether the manner in which it is exercisable *rests on some rational foundation.*" 368 U.S. at 57. (Emphasis added.)

Since we find the *Rawlins* and *Hoyt* cases dispositive of the constitutional question, we hold that appellants' complaint was correctly dismissed.

We do not reach the issue of immunity from damage suits under the Civil Rights Act, 42 U.S.C. §§ 1981, 1983, since we find no rights of the appellants have been violated.

AFFIRMED.

KOELSCH, Circuit Judge, CONCURRING SPECIALLY.

I do not share the court's view that the Zelechowers' pleading tenders no substantial federal question. As noted in the opinion, the attack centers upon Section 897 of the California Penal Code and a Local Rule (Rule 29) promulgated by the Superior Court of Los

Angeles County, California. Both the statute and the rule regulate the selection of persons for grand jury service. The statute operates to exclude from elgibility, persons "who are not exempt from serving . . . " Further statutes (Cal. P.C. 894 and CCP 200) specifically designate the persons so exempted. So far as pertinent to this case they are:

> "(1) A judicial, civil, naval or military officer of the United States or of this State, or a member of the Armed Forces of the United States while on active duty;
>
> * * *
>
> (3) An attorney at law, or the clerk, secretary, or stenographer of an attorney at law;
>
> * * * * "

Local Rule 29 (although ambiguous) contains a broader exclusion than the statute and makes ineligible for grand jury service "(b) Spouses of judges and Commissioners of the Superior Court and the Municipal Court and attorneys known to be in active practice . . ."

The Zelechowers' theory, urged in their complaint, is that the quoted provisions appearing in both the statute and the rule contravene the Fourteenth Amendment to the Federal Constitution because the classifications are arbitrary. This court, on the supposed authority of *Rawlins v. Georgia,* 201 U.S. 638 (1906) and *Hoyt v. Florida,* 368 U.S. 57 (1961), holds these classifications reasonable and declares both statute and rule constitutionally valid.

I am not so sanguine. The *State statute* is probably not vulnerable to the attack for, as pointed out in *Rawlins*, an exclusion is valid if the work of the class is of such public importance that it should not be interrupted. The enumeration in the statute is of persons so engaged.

But I entertain grave doubts about the validity of the local rule. It creates and excludes a class consisting of "spouses" of those whose work warrants their being set apart and treated differently than others. However, it does not follow that because of their marital status the husbands and wives thus singled out are all engaged in some common activity or indeed any activity, much less one that would permit a like differentiation to be made of them.

Thus, unlike my brothers Barnes and Kilkenny, I would not so readily place a judicial imprimatur upon the local rule; neither would I reach the question of its validity. The Supreme Court has repeatedly declared that ordinarily it ought not to pass upon the constitutionality of a statute or rule unless adjudication is unavoidable and that the same principle should guide the lower courts as well. We should heed that admonition in this case.

I nevertheless concur in the result reached in the opinion. As there stated, injunctive relief should be withheld on principles of abstention. Declaratory relief can and should be denied on the same basis; and the action for damages against all defendants is nullified by the doctrine of immunity. The opinion holds

that several of the defendants are so protected, but expresses no opinion as to the defendants Younger and Lynch. The latter are, respectively, the District Attorney for Los Angeles County, California and Attorney General of that State. The complaint does not show and indeed could not be amended to show, their conduct on which the claims are purportedly based was not in the performance of their official duties.

I would affirm on that ground.

APPENDIX "B"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD D. ZELECHOWER, M.D.; THEODORE A. COHEN; SUSAN COHEN; PETER D. BOGART and JUNE BOGART, *Plaintiffs,*	)	
v.	)	
EVELLE J. YOUNGER, individually and as District Attorney of the County of Los Angeles; the BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; The SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES; THOMAS C. LYNCH, individually and as Attorney General of the State of California; the PEOPLE OF THE STATE OF CALIFORNIA, by RONALD REAGAN, Governor of the State of California, *Defendants.*	)	No. 67-1459-FW ORDER DISMISSING ACTION

In this action defendants have moved to dismisss the action of plaintiffs on the grounds that no claim for relief is stated in plaintiffs' complaint. Defendants Lynch and People of the State of California, by Ronald Reagan, Governor of the State of California, have

moved to dismiss on the additional grounds that the alleged federal questions are sham, frivolous and unsubstantial.

The plaintiffs' complaint discloses that plaintiffs seek an injunction enjoining defendants from giving force and effect to indictments of the Grand Jury of Los Angeles County returned against such said plaintiffs, and for a decree ordering defendants to dismiss such indictments now pending in the Superior Court of the State of California for the County of Los Angeles, and for a decree declaring that the methods of selection of jurors and grand jurors in the Superior Court of the State of California for the County of Los Angeles are void and of no legal effect because unconstitutional; and plaintiffs also pray for nominal damages of One Dollar ($1.00) with the right to amend to pray for full compensatory damages.

The indictment against plaintiffs Bogart is filed in criminal case No. 285313 in the records of the Superior Court of the State of California in and for the County of Los Angeles; it was returned by the Grand Jury on or about February 27, 1964. The indictment against the other plaintiffs is filed in criminal case No. 329469 in the records and files of said Superior Court; is was returned on or about September 26, 1966. The plaintiffs were charged with grand theft and some of them were also charged with criminal conspiracy. The capacities of the various defendants appear in the caption of this action, which is self-explanatory. Plaintiffs invoke jurisdiction of this Court un-

der Title 28, United States Code, Sections 1331 and 1443, and Title 42, United States Code, Sections 1981, 1983, and 2000B-2000B(3). In short, they base their claim of right on the Civil Rights Act.

While this court is aware of the rule that an action, as distinguished from a complaint, should not be dismissed on the grounds that there is a failure to state a claim upon which relief can be granted[6], this case is one in which the action can be dismissed under the rule enunciated in the case of *Sires v. Cole*, 320 F.2d 877, 879 (9th Cir. 1963), as well as in the case of *Haldane v. Chagnon*, 345 F.2d 601, 603 (9th Cir. 1965). Here it is clear that the plaintiffs are asserting a complaint for an injunction, declaratory relief and damages solely upon the grounds that their respective indictments are void because returned by grand juries which were selected in a manner unconstitutionally discriminatory to plaintiffs and that defendants in their respective official capacities are giving full force and effect to such indictments. The affidavits of plaintiffs Peter D. Bogart and Theodore A. Cohen filed in support of their motion for preliminary injunction, which motion has been denied by the Court, as well as the complaint and the file of the case, make clear that the plaintiffs are relying solely upon their claim of invalid Grand Jury indictments because of such unconstitutional discrimination against them in the selection of the Grand Juries returning the respective indict-

[6] *Conley v. Gibson*, 355 U.S. 41, 45-46 (5th Cir 1957); *Marshall v. Sawyer*, 301 F.2d 639, 647 (9th Cir. 1962); *Corsican Publications v. Pitchess*, 338 F.2d 441 (9th Cir. 1964); *Haldane v. Chagnon*, 345 F.2d 601, 603 (9th Cir. 1965).

ments. Their claim of unconstitutional discrimination in the selection of Grand Juries is based upon their claim that doctors and lawyers and their wives are excluded from Grand Jury service. Plaintiff Richard D. Zelechower is a doctor; plaintiff Theodore A. Cohen is a lawyer and plaintiff Susan Cohen is the latter's wife; plaintiff Peter D. Bogart is a lawyer and plaintiff June Bogart is the latter's wife.

Therefore, the mere granting of a motion to dismiss the complaint with leave to plaintiffs to amend would be an idle act; and any additional allegations concerning the discrimination against plaintiffs would be frivolous in view of the official capacities and the natures of the defendants herein so that the complaint is not subject to a corrective amendment. See *Sires v. Cole, supra,* at p. 879.

It will be hereinafter shown that each of the defendants is not subject to this suit under the Civil Rights Act but the Court will first discuss plaintiffs' claims as if at least some of the defendants were subject to such suit.

For the reasons hereinafter stated, injunctive relief should not be granted to plaintiffs.

Plaintiffs here rely on the Civil Rights Act in asserting their alleged right to an injunction. Such reliance in this case is without merit. The Civil Rights Act "should be construed so as to respect the proper balance between the states and the federal government

in law enforcement,' *Screws v. United States*, 325 U.S. 91, 108 . . . discretionary refusal to exercise equitable power under the Act to interfere with state criminal prosecution is one of the devices we have sanctioned for preserving this balance. *Douglas v. City of Jeanette*, 319 U.S. 15)." *Stefanelli v. Minard*, 342 U.S. 117, 121-122. Thus it is proper to withhold relief in equity even when recognizing that comparable facts would create a cause of action for damages. *Stefanelli v. Minard, supra*, at p. 122.

As stated in *Stefanelli v. Minard, supra*, at p. 122, ". . . courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarass threatened proceedings in state courts save in those exceptional instances which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent." Citing *Douglas v. City of Jeanette, supra*, at p. 163.

The very complaint which plaintiffs make here, to wit, that they are entitled to an injunction because of unconstitutionality in the impaneling and selecting of grand juries was suggested by the Supreme Court in *Stefanelli v. Minard* at p. 123 of the official opinion as being one of the complaints that should not be honored with an injunction enjoining the state criminal proceeding.

The Court of Appeals for the Ninth Circuit set aside a District Court injunction enjoining prosecution

under an indictment returned by a Grand Jury where the District Court had ruled that the indictment should be set aside for two grounds, one of which was that the indictment had been returned by a Grand Jury not drawn from a fair cross-section of the population. *Ackerman v. International Longshoremen's & Warehouseman's Union*, 187 F. 2d 860 (9th Cir. 1951), reversing *International Longshoremen's & Warehousemen's Union v. Ackerman*, 82 F. Supp. 65. (The District Court's position in the last cited case concerning the invalidity of the indictment because of the Grand Jury question is set forth at p. 122 of the District Court decision.)

Plaintiffs rely on the ruling in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), where the Supreme Court found justification for an injunction restraining state officials from prosecuting or threating to prosecute plaintiffs. That case is clearly distinguishable from the case at bar: there the injunction was sought prior to the commencement of the prosecution and there was an interference by the state with freedom of expression and other First Amendment freedoms. Footnote 2 at p. 484 of the *Dombrowski* opinion makes clear that the decision therein made is bottomed on the fact, inter alia, that the state prosecution there involved had not been instituted at the time that appellants had sought injunctive relief in the U.S. District Court. In the case at bar the prosecutions sought to be enjoined have been pending for a long time; in fact, the prosecution against plaintiffs Bogart has been

pending for so long that plaintiffs Bogart would in any event seem to be barred by laches were it not for the fact that their application for injunction should be in any event denied for the reasons hereinbefore and hereinafter stated.

The plaintiffs have shown no extraordinary circumstances or irreparable injury which justifies this Court in granting an injunction. There is an ample opportunity to plaintiffs for ultimate review of federal questions. Here the claimed invalidity in the California Grand Jury system arising because of the exclusion of doctors, lawyers, and their respective wives from the Grand Jury panel does not present such manifest injustice, nor does it constitute the basic denial of due process, within the meaning of the rules which would permit interference with state criminal proceedings. The exemption of lawyers and doctors from jury service is of old stading and not uncommon in the United States. *Rawlins v. Georgia,* 201 U.S. 638, 640. A reasonable classification of exemptions from jury service will be upheld. *Hoyt v. Florida.* 368 U.S. 57 (1961).

For the same reasons as apply to the denial of injunctive relief, this court should not assume jurisdiction and proceed to determine whether or not the Grand Jury indictments involved are valid: nor should it proceed to determine the rights of the parties in the premises: nor should it proceed to make a determination as to the constitutional validity of the methods of selecting Grand Juries in the State of California. See *Brillhart v. Excess Insurance Co.,* 316 U.S. 491.

The balance of plaintiff's claim is based upon a claim for damages because of the actions of defendants in proceeding upon or threatening to proceed upon the alleged invalid indictments. However, at the present time they pray only for nominal damages of One Dollar ($1.00). While they seek the right to amend their prayer for larger damages in the event that the facts should justify, such an amended prayer would be frivolous. Damages being claimed to be less than the sum of $10,000.00, there is no federal jurisdiction to entertain the controversy herein insofar as damages only are concerned. 28 U.S.C. 1331(a). There must be a substantial federal question and here it is clearly apparent that there is none.

The Court now considers the dismissal of the action as to each of the defendants because of the fact that none of them is subject to suit under the Civil Rights Act.

The action must be dismissed as to the Superior Court of the State of California for the County of Los Angeles for the reason that judges are immune from civil liability for acts done in the course of their official functions and this doctrine is operative in actions grounded upon the Civil Rights Act. *Haldane v. Chagnon, supra,* at p. 603, citing authorities; *Serrano v. People of the State of California, et al.,* 361 F. 2d 474 (9th Cir. 1966).

The action must be dismissed also as to defendant People of the State of California, by Ronald Reagan, Governor of the State of California: People of the

State of California are immune from suit under the Civil Rights Act. *Serrano v. People of the State of California, et al., supra.*

Likewise the action must be dismissed as to defendant the Board of Supervisiors of the County of Los Angeles. Action under the Civil Rights Act must be against individual persons or officials; and the Board of Supervisors of Los Angeles County is not a suable legal entity. *Handy Cafe v. Justices of the Supreme Court, et al,* 248 F.2d 485, 487 (1st Cir. 1957). If it is plaintiffs' intention to sue the County of Los Angeles by suing the Board of Supervisors thereof, nevertheless the action still must be dismissed inasmuch as a county is immune from suit under the Civil Rights Act. *Monroe v. Pape* 365 U.S. 167, 187; *Sires v. Cole,* 320 F.2d 877, 879 (9th Cir. 1963).

Too, the action must be dismissed as to the individual defendants, to wit, Evelle J. Younger, individually and as District Attorney of the County of Los Angeles, and Thomas C. Lynch, individually and as Attorney General of the State of California. It affirmatively appears from the face of the plaintiffs' pleadings and from the whole record, in the case that plaintiff's action against these two individuals is actually against them in their official capacity. In paragraph 4 of plaintiff's complaint it is alleged that defendant Younger is charged with prosecution of indictable offenses within the County of Los Angeles and that defendant Lynch as Attorney General of the State of California is charged with the duty of enfore-

ing the statutes of and acting as counsel for the People of the State of California. It affirmatively appears from the complaint and from the whole record that plaintiffs are suing these two individual defendants based upon their intention to proceed with the prosecution of plaintiffs respectively under the indictments heretofore mentioned. A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages, including an action under the Civil Rights Act, as that which protects a judge. *Barr v. Matteo*, 360 U.S. 564, 569; *Sires v. Cole*, *supra*, at p. 80. Such immunity extends to both Younger and Lynch where it is clear as here that these defendants are acting only in the performance of their traditional official functions. See *Robichaud v. Ronan*, 351 S.2d 533, 535.

Therefore, where as here none of the defendants is suable under the Civil Rights Act for damages and where as here injunctive relief should not be granted; and where as here this Court should not exercise jurisdiction to make a declaration as to the rights of the parties under the indictments mentioned or as to the validity of the indictments, it is appropriate to dismiss the action, it being determinable affirmatively from the complaint and from the entire record that plaintiffs are not entitled to any relief. Accordingly,

IT IS ORDERED that the within action is now dismissed.

DATED this 5th day of February 1968.

FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE